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Re: Comments on Proposed Changes to Regulations B, E, M, Z, DD and the Official Staff Commentarys, Docket Numbers R-1167, 1168, 1169, 1170, 1171

I am an attorney in private practice. My practice is devoted to representing low to middle income consumers in financial matters, including mortgage transactions. I submit these comments on behalf of my clients.

I. Exercise of the right to cancel.

The Truth In Lending Act ("TILA") permits a consumer to understand the true cost of credit that is being offered. Unfortunately, the efforts to require the disclosure of the annual percentage rate and other material disclosures is often overshadowed by the practice of some lenders where the TILA disclosure statement is brushed off by explanations such as "that is something that the government requires but your interest rate is only …". As a result, many consumers do not understand the costs of the transaction.

The notice of right to cancel is important to the efficacy of the TILA. The extended right to cancel, when a consumer has not been provided the proper disclosures, is crucial to the TILA. Equitably, the consumer who was not provided the material disclosures seems to be more deserving of the right to cancel then someone who was provided all of the information before closing. Unfortunately, the court's interpretation of the consequences of the exercise of the right to cancel during the extended period has virtually eliminated its importance and vitality.

The courts have placed severe limitations on the practical ability of the consumer to cancel the transaction. Most notable is the 9th Circuit's recent decision in Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003). Yamamoto virtually eliminates the right of consumers to exercise the right to cancel unless the consumer has the ability to tender a potentially large sum of money to the creditor. This is inconsistent with the spirit and remedial nature of the TILA. Your proposed revision of Regulation Z in this regard is very welcomed but with all due respect should be clearer in a number of ways.

I concur with the comments submitted by the National Consumer Law Center (NCLC") that the terminology in the Supplemental Information that states: "Accordingly, where consumers seek rescission and the matter is contested by the creditor, a determination regarding consumers' right to rescind *would normally* be made before a court determines the amounts owed and

establishes the procedures for the parties to tender any money or property" should be changed from "would normally" to "must".

Further, the example proposed by the NCLC, that states:

> *For example, a court may condition the filing of the release of the security interest, as opposed to the automatic voiding of the lien, upon the consumer's tender and may allow the consumer a period of time to repay the tender and/or to pay it in installments.*

should be adopted with following addition:

> Payment in installments should always be considered by the courts in an effort to avoid eliminating the right of a consumer entitled to exercise the right to cancel the transaction.

This is very important to those who find themselves in a loan that was provided that was greater than the property value or find their property values dropping. In the absence of a installment payment option, a consumer may lack the ability to refinance the loan to meet any tender obligation. For example, there is a secondary mortgage product referred to as a 125% loan which means the loan is based on 125% of the property's value. /1 A consumer has very little chance of finding a new lender who will loan over and above the value of the property.

II. The clear and conspicuous standard.

The efforts to harmonize the regulations that address the clear and conspicuous standard is also very welcomed. / 2 My input on this issue is that the regulations should be made clear that a disclosure that provides conflicting information is improper. For instance, the disclosure of the APR is required on the TILA Disclosure statement and the prior disclosures required by the Home Ownership and Equity Protection Act. The HOEPA clearly states what disclosures should be made. It states that the APR must be disclosed. The intent is obviously to make sure that the APR is emphasized to the consumer. As noted above, some lenders seek to verbally diminish the impact of the APR by statements such as "that is something that the government requires but your interest rate is only …". While the verbal statements are certainly inappropriate, the commentary should confirm that the inclusion of the interest rate next to or in close proximity to the APR disclosure violates the clear and conspicuous standard under TILA and is contrary to the disclosures mandated by HOEPA.

III. The delivery of the rescission notice.

As noted above, the TILA is remedial legislation designed to aid all consumers, including the least sophisticated consumer. The 9th Circuit's decision in Miguel v. Country Funding Corp., 309 F. 3d 1161 (9th Cir. 2002) presents hurdles that the most sophisticated consumer or even a

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1 The loans are also referred to as "no equity" loans. A google search will show many hits for "125% loans". Ironically, while these loans are not supported by any equity, the courts are reluctant to allow a consumer to exercise the right to cancel and automatically void the lien for these no equity loans without immediate repayment of the remaining balance.

2 I adopt the comments submitted by the NCLC on this issue. However, as set forth herein, a specific prohibition against clearly contradictory information in disclosures is necessary and appropriate.

skilled consumer attorney may not be able to meet thereby reducing, if not eliminating, the rights afforded consumers under the TILA. In Miguel, the court held that providing written notice to the servicer was ineffective. For most, the servicer is the only entity that the consumer can identify. Do you know who actually owns your mortgage?

The mortgage industry itself has sought to "privatize" information regarding the ownership of mortgage loans. For instance, the industry has created Mortgage Electronic Registration Systems, Inc. ("MERS"). As set forth on its web site at www.mersinc.org, the industry defines the purpose behind MERS:

> ***What is MERS?***
>
> MERS was created by the real estate finance industry to eliminate the need to prepare and record assignments when trading mortgage loans.
>
> ***How does MERS work?***
>
> Our members record MERS as mortgagee as nominee for the lender in the county land records and electronically track changes in servicing and beneficial ownership rights over the life of the loan on the MERS® System.
>
> ***What is the MERS mission?***
>
> Our mission is to register every mortgage loan in the United States on the MERS® System.

The reality is that a consumer may not be able to determine who may actually own his or her loan. A full blown title search will not provide the answer since the search may result in no other information that the mortgage is held by MERS – a nominee for the true unidentified owner. If the decision in Miguel stands, then the ability of consumers to enforce important provisions of TILA will all but disappear. Such a result must be avoided. For this reason, notice to a servicer should be considered sufficient. The proposed commentary seeks to redress the Miguel decision. However, the proposal does not ultimately simplify the process but will merely invite litigation on a collateral issue, e.g. questions of agency under various state laws, severely hampering the ability of consumers to exercise his or her rights under the TILA. Therefore, the regulations should be clarified that service of an election to cancel on a servicer is effective.

There is another issue under the notice provisions that should be addressed. Under the current regulation a consumer "To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.." See 12 C.F.R. § 226.23(a)(2). The regulation does not specifically address whether or not the filing of a lawsuit meets this standard. The filing of a lawsuit certainly puts a defendant on written notice of the consumer's claim and therefore falls within the parameters of 226.23 (a)(2). The courts have reached the logical

conclusion that the filing of a complaint constitutes notice to a creditor of the consumer's exercise of his or her election to cancel a transaction. See e.g., Taylor v. Domestic Remodeling, 97 F.3d 96, 1996 U.S. App. LEXIS 27116 (5th Cir. 1996); Elliott v. ITT Corp., 764 F. Supp. 102, 105-06 (N.D.Ill.1991). Consistent with this determination, the courts have further held that the notice set forth in the lawsuit is considered given when it is filed with the court. See e.g., Taylor v. Domestic Remodeling, supra. Notwithstanding, there continues to be litigation over this issue. See McIntosh v. Irwin Union Bank & Trust, 215 F.R.D. 26 (D. Mass. 2003). To eliminate further litigation on this issue, 12 CFR 226.23 (a)(2) should be rewritten to provide:

> "To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, legal pleading, or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or legal pleading, or, if sent by other means, when delivered to the creditor's designated place of business.

The delivery of a legal pleading is already addressed by a comprehensive set of court rules. Allowing the notice to be served in accordance with applicable court rules will avoid creating a separate system for claims under TILA.

IV. Amounts disclosed as Dollar Amounts.

The goal of the TILA is to provide consumers with useful information in an easily understood manner. A numerical presentation is more readily understood then any written explanation of a numerical amount. In Carmichael v. Payment Center 336 F.3d 636 (7th Cir. 2003) the court held that a description of an amount due, i.e., how a final payment can be calculated, satisfied the TILA. Thank you for your efforts to fix the problem created by this decision. I concur with the comments submitted by the NCLC in regard to this issue.

V. Conclusion

I appreciate the opportunity to share my comments with you on your proposed regulations. The TILA act is an important protection for consumers, and in particular for homeowners. It can often mean the difference between preserving a home for a family to live in when a lender fails to properly obtain a security interest against someone's home. The proposed changes made by you are important to preserve the protections afforded by the TILA. My comments are submitted to provide to you a practical perspective of the workings of the TILA. I hope you will consider them.

If I can provide any additional information or answer any questions, I can be reached by phone, toll free, at 888-534-4592 or by e mail at Borison@legglaw.com .

Yours truly,

Scott C. Borison